KWANGTUNG PROVINCIAL BANK v. OSAKA SHOSHEN KAISHA; and BAN HIN LEE BANK LTD., THIRD PARTY OSAKA SHOSHEN KAISHA v. BAN HIN LEE BANK LTD.

[C. A. (Whitton, Buhagiar & Tan Ah Tah JJ.)
June 6, 1957]

[Singapore — Civil Appeal No. 23 of 1956]

Shipping — Carriage of goods — Bill of lading — Contract of indemnity — Delivery order — Goods described in bill of lading different from goods covered by indemnity — Claim against third party.

In this case the plaintiffs claimed $5,560.06 against the defendants for failure to deliver certain goods said to have been shipped on board a vessel named "Atlas Maru" for carriage from Hongkong to Singapore under a Bill of Lading dated August 2, 1953 given by the defendants in favour of the plaintiffs or order. The defendants denied liability but joined the Ban Hin Lee Bank Ltd. as a 3rd party, maintaining that if they were themselves liable to the plaintiffs the 3rd party was liable to indemnify them under the terms of a letter of indemnity dated August 12, 1953. When the case came on for hearing the plaintiffs applied for and obtained leave to discontinue, their counsel explaining that he was unable to distinguish their claim from that of the plaintiffs in a recent case in which judgment had been given for the defendants. Counsel for the defendants made no objection to this application and mentioned that the plaintiffs had agreed to pay the defendants a lump sum for costs on a party and party basis, but intimated he proposed to continue with the proceedings against the 3rd party since the difference between the lump sum and the defendants' costs on a solicitor and client basis was considerable.

The learned trial Judge held that the defendants have failed to show that the plaintiffs' claim fell within the contract of indemnity and therefore their claim to be indemnified by the 3rd party against the costs of defending the action must be dismissed with costs. The defendants appealed.

Held: (Whitton and Tan Ah Tah JJ., Buhagiar J. dissenting) the defendants-appellants have succeeded in discharging the burden of proof placed upon them and they are therefore entitled to an indemnity from the 3rd party in respect of the plaintiffs' claim and costs of defending the same.

Cases referred to:—

(1) *New Chinese Antimony Co. Ltd. v. Ocean Steamship Co. Ltd.* (1917) 2 K.B. 664.

(2) *Aklieselskabet Fir Kemisk Industrie v. Robert Park & Co. Ltd. and Seligman Bros.* 13 Ll.L.R. 43.

(3) *Bank of China v. Brusgaard Koisterud & Co. etc.* (1956) M.L.J. 124.

COURT OF APPEAL.

J. E. Lloyd for the appellants.

C. H. Smith for the respondents.

Whitton J. : — In this case the plaintiffs claimed $5,560.06 against the defendant shipping company for failure to deliver certain goods said to have been shipped on board a vessel named "Atlas Maru" for carriage from Hongkong to Singapore under a Bill of Lading, dated 2nd August 1953, given by the defendants in favour of the plaintiffs or order. The defendants denied liability but joined the Ban Hin Lee Bank Ltd. as a Third Party, maintaining that if they were themselves liable to the plaintiffs the Third Party was liable to indemnify them under the terms of a letter of indemnity dated 12th August 1953. When the case came on for hearing the plaintiffs applied for, and obtained, leave to discontinue, their counsel explaining that he was unable to distinguish their claim from that of the plaintiffs in a recent case[3] in which judgment had been given for the defendants. Counsel for Osaka Shoshen Kaisha made no objection to this application and mentioned that the plaintiffs had agreed to pay the defendants a lump sum for costs on a party and party basis, but intimated he proposed to continue with the proceedings against the Third Party since the difference between the lump sum and the defendants' costs on a solicitor and client basis was considerable.

In these circumstances the issue at the trial and before this Court is whether on the facts of the matter the Third Party are to be held liable under the terms of the letter of indemnity. The material portion of this document for present purposes reads as follows :—

"In consideration of your releasing for delivery to us or to our order the undermentioned goods without production of the relevant bill(s) of lading we hereby undertake and agree:

(1) To indemnify you fully against all consequences and/or liabilities of any kind whatsoever directly or indirectly arising from or relating to such delivery . . . . etc."

It will be necessary in a moment to refer to the "undermentioned goods" more fully. The learned trial Judge has referred in his judgment to the nature of this type of guarantee, and I need not elaborate upon this point. It is, to put the matter very briefly, an offer which is accepted by the release of the cargo, or perhaps it is more exact to say, by the issue of a delivery order.

It would appear to be clear then from the terms of the contract that the defendants must prove (a) that they released certain goods for delivery; (b) that the goods so released were precisely such as are scheduled in the indemnity. It will be convenient to set out particulars of the goods listed in the indemnity, and, as much of the argument depended on the discrepancies between the two, alongside the particulars in the Bill of Lading.

Indemnity	Bill of Lading
21 packages preserved eggs	7 jars preserved eggs
15 packages joss sticks	7 packages joss sticks
3 packages preserved fruit	10 packages preserved fruit
10 packages preserved vegetables	55 packages salted vegetables
30 packages rice noodles	
79	79

It should also be mentioned that the particulars in the Delivery Order issued by Messrs. Paterson, Simons & Co. Ltd., the defendants' agents, were identical with those of the indemnity. It is obvious that the goods which are the subject matter of the statement of claim i.e. those described in the bill of lading, are substantially different from those described in the Indemnity. Therefore, the defendants, if they are to succeed, must prove that the cargo of goods for which a release for delivery was given, and the wrongful delivery of which undoubtedly led to the institution of these proceedings and to the liabilities in respect of solicitors' costs subsequently incurred, consisted in fact of the precise goods scheduled in the indemnity. Such "onus", I take it, amounts to showing that the probabilities of the matter are the contents of the cargo were identical with the schedule list in the letter of indemnity.

Now as to the evidence on this matter, in the first place we have the unrebutted testimony of Mr. Gourly of Messrs. Paterson, Simons & Co. Ltd. which goes a considerable way, in my opinion, towards establishing they were identical. Gourly stated that from the manifest of the Atlas Maru it appeared there was only one consignment of 79 packages on this voyage, and that the relative Bill of Lading was numbered 72, which was the number of the Bill of Lading to which the Indemnity, addressed to the Agents and to the master of the S.S. Atlas Maru, purported to refer He also referred to the issue of the Delivery Order, a copy of which is on the record and bears on its reverse the words Ban Hoe Co. (a firm which had joined in the Indemnity) with a signature Lim Ban Seng (a gentleman whose signature also appears on the indemnity) and said no complaint was made, as far as he knew, by the party to whom the Delivery Order was issued. Now there is nothing in all this which raises the slightest suggestion there was any interference with the cargo in any way from the time it was loaded in Hongkong until its delivery to Ban Hoe Co., Singapore. Moreover if Ban Hoe Co. had delivered to them articles different from what they had expected it would have been natural for them to make a complaint. Again I think one can only assume that the Third Party and/or Ban Hoe Co. must have had some advance information from Hongkong as to the contents of the cargo before the list in the Indemnity could be prepared. In these circumstances the issue seems to me to be whether it is more probable that Ban Hoe Co. received exactly what they were expecting and the consigners for some reason of their own had the goods misdescribed in the Bill of Lading, or that there was an actual discrepancy between the goods comprising the cargo and those listed in the Indemnity. After careful consideration I have formed the opinion the former more probably occurred

In reaching this opinion I have borne in mind that it appears correct to say on the authority of *New Chinese Antimony Co. Ltd. v. Ocean Steamship Co. Ltd.*[1] a bill of lading is not evidence of the nature of the goods to which it relates, at least in a case where the bill of lading contains a clause, as this one does, to the effect the contents etc. are unknown.

It seems to me that in this Court we have had the advantage of having had the merits of the appellants' case presented with greater ability and insight than in the Court below. There it was suggested the fact the bill of lading and the indemnity both referred to 79 packages in conjunction with the evidence generally sufficed to prove the goods shipped were identical with those delivered to Ban Hoe Co., and that the divergence in the descriptions of the goods in the documents was immaterial. This view I believe to be incorrect. I think it is essential, as I hope I have made clear, to prove the goods delivered were identical with those described in the indemnity. It is true that an exception to this proposition regarded on the broader basis of a general rule appears to exist, on the authority of

Aklieselskabet Fir Kemisk Industrie v. Robert Park & Co. Ltd. and Seligman Bros.[2] in a case where the consignee accepts delivery despite a patent discrepancy between the goods delivered and the goods described in the indemnity, but that is a situation which did not occur in the present instance. I am, nevertheless, for the reasons I have given, of the opinion the appellants have succeeded in discharging the burden of proof placed upon them, and accordingly I would allow this appeal with costs, and hold that the appellants are entitled to an indemnity from the Third Party in respect of the plaintiffs' claim and the costs of defending the same.

Buhagiar J. : — This is an appeal from the decision of the learned Chief Justice who held that the defendants (appellants) had failed to show that the plaintiffs' claim fell within the contract of indemnity and entered into between themselves and the Third Party (the respondents) and that therefore their claim to be indemnified by the Third Party against the costs on a solicitor and client basis, on defending the action against them by the plaintiffs must be dismissed with costs.

The facts are set out in the judgment of the Court below and it is sufficient here to mention that the respondents gave a letter of indemnity in the usual form containing a reference to the number of the Bill of Lading (72), marks on the merchandise (BH), number of packages (79), description of the goods and the port of shipment. The Bill of Lading (No. 72) included particulars of marks (BH) and number of packages (79); the description of goods contained in the letter of indemnity, is different from that in the Bill of Lading. Condition 2 on the Bill of Lading is in the usual form.

On behalf of the appellants it was argued that the description of the goods in the Bill of Lading is, in view of the said condition, mere surplusage and binds no one and counsel relied on the *New Chinese Antimony Co. Ltd. v. Ocean Steamship Co. Ltd.*[1]. The principle there laid down, although the case was not specifically referred to us was accepted in a *Bank of China v. Brusgaard Koisterud & Co.; and the Bank of East Asia Ltd.; and Thong Lee Trading Co. Third Parties*[3]. That being so, it was argued on behalf of the appellants, the learned Chief Justice attached too much weight to the discrepancy in the description of the goods in the letter of indemnity and in the Bill of Lading and that on the evidence the learned Chief Justice should have held that the plaintiffs' claim related to a manifested quantity of 79 packages marked "BH" and shipped at Hongkong under the Bill of Lading on which the plaintiffs sued.

It was submitted that the evidence showed clearly that the goods in respect of which the letter of indemnity was given referred to the 79 packages mentioned in the Bill of Lading (No. 72) which were boarded at Hongkong for carriage to Singapore and for delivery there to order — Ban Hoe Company to be notified; there was evidence that the goods were so discharged and delivered. It was argued that this was conclusive evidence that the 79 packages referred to in the letter of indemnity referred to the 79 packages in the Bill of Lading and that therefore the respondents were liable; or, if not conclusive evidence, it was *prima facie* evidence which was sufficient to shift the burden on the respondents to prove that the goods were not the same. This argument is, in my opinion, fallacious because the description of the goods cannot be read out of the letter of indemnity.

It is an established principle of law that "the surety is entitled to insist upon a rigid adherence to the terms of his (the surety's) obligation by the creditor and cannot be made liable for more than he has undertaken" (see *Halsbury's* Laws of England (Hailsham edition) Vol. XVI p. 59). If the description of the goods in the Bill of Lading is mere surplusage the description of the goods in the letter of indemnity is not and that document cannot be read as if that description did not exist.

Counsel for the appellants also argued that the principles in *Aklieselskabet Fir Kemisk Industrie v. Robert Park & Co. Ltd., and Sterns Ltd., and Sterns Ltd. and Seligman Bros. (Third Parties,)*[2] applied to the facts of this case. He said that the delivery order had noted thereon the goods in identical terms as in the letter of indemnity; the goods were collected on that delivery order which was endorsed and no complaint has been made since then. He said there is an admission by the respondents in the pleadings that the goods delivered were the same goods in the Bill of Lading

and he submitted that the appellants had proved the quantity and contents of the packages which were delivered without production of the Bill of Lading.

I agree with the learned Chief Justice that the appellants have not been able to prove this and I do not think there is an admission by the respondents to that effect. Paragraph 3 of the defence amounts simply to a denial of liability on the grounds that the letter of indemnity referred to certain goods while according to the plaintiffs' claim and the allegation of the appellants different goods were delivered. This contention of the appellants therefore also fails.

I would dismiss the appeal with costs.

Tan Ah Tah J. : — In this case the plaintiffs sued the defendants for damages for failing to deliver to them in Singapore certain goods which they alleged were shipped by a firm carrying on business in Hongkong under the style of Sing Yuen Co. on board the steamship Atlas Maru for carriage from Hong Kong to Singapore under a bill of lading dated the 2nd August 1953. The defendants by their defence denied liability but joined the Ban Hin Lee Bank Ltd. as a Third Party, claiming that the bank was liable to indemnify them under the terms of a letter of indemnity dated the 12th August 1953. When the case came on for hearing in the court below the plaintiffs were given leave to discontinue the action, but the defendants decided to continue the Third Party proceedings with a view to establishing their claim that the Third Party was liable to indemnify them in respect of the solicitor and client costs which they had incurred in defending the action brought against them by the plaintiffs. In the result this claim was dismissed with costs by the court below. The defendants now appeal against the decision of the learned trial Judge.

The letter of indemnity was signed by representatives of the Third Party and a firm named Ban Hoe Co. to whom or to whose order the packages of goods had in effect been consigned. By the letter of indemnity the Third Party and Ban Hoe Co., in consideration of the defendants releasing for delivery the goods described therein, agreed to indemnify the defendants fully against all consequences and/or liabilities of any kind whatsoever directly or indirectly arising from or relating to such delivery of the goods without production of the relevant bill of lading. There was no dispute that 79 packages of goods were shipped at Hong Kong and that the letter of indemnity covered 79 packages. However, the particulars of the goods set out in the bill of lading and in the letter of indemnity differed in many respects and this circumstance was relied upon by counsel for the Third Party to support his contention that it had not been proved that the goods described in the letter of indemnity had been delivered to Ban Hoe Co. It will be convenient at this stage to consider whether this contention is well-founded. In dealing with the matter it is necessary to bear in mind that while the defendants called a witness in the person of Mr. Gourly, who was employed in the shipping department of the defendants' agents, no witnesses were called to give evidence on behalf of the Third Party. As Mr. Gourly's evidence thus remained unrebutted the court is entitled to draw from his evidence and the documentary exhibits such inferences as may properly be drawn. In my opinion one such inference is that Ban Hoe Co. were expecting the arrival of the goods detailed in the letter of indemnity in the form in which it was prepared, with particulars of the categories of goods and the number of packages in each category. On receipt of the letter of indemnity the defendants' agents issued a delivery order containing particulars of goods which were almost word for word the same as those set out in the letter of indemnity. The next important fact to be noticed is the endorsement made on the back of the delivery order by the representative of Ban Hoe Co. indicating that he had taken delivery of 61 and 18 packages making a total of 79 packages of goods. It is to be observed that although it is possible to arrange the packages listed in the letter of indemnity in two lots, one consisting of 61 packages and the other of 18 packages, it is impossible to do so in the case of the packages set out in the bill of lading. The last fact of importance to be noticed on this aspect of the case is that, as appears from the evidence of Mr. Gourly, no complaints were received in respect of delivery of the goods. If Ban Hoe Co. had taken delivery of packages which contained goods different from those which they were expecting, it would have been a normal consequence for them to have lodged a complaint with the defendants' agents. These then are the facts and inferences which in my opinion can

be found and drawn from the evidence and documentary exhibits in this case. Having considered them I have reached the conclusion that the contention of counsel for the Third Party is not well-founded. In my opinion the defendants have succeeded in proving that the goods set out in the letter of indemnity were delivered to Ban Hoe Co.

It now remains to consider whether the action brought by the plaintiffs against the defendants was a consequence arising from or relating to the delivery of the goods to Ban Hoe Co. It is clear from the plaintiffs' statement of claim and the documentary evidence that the plaintiffs' claim was based on the failure to deliver to them 79 packages of goods shipped at Hong Kong by Sing Yuen Co. on board the Atlas Maru under bill of lading No. 72 dated the 2nd August 1953. The particulars of the goods set out in the statement of claim are the same as those described in the bill of lading. Now clause 2 of the bill of lading is in the following terms :—

> "(Unknown) Contents, quality, quantity, weight, numbers and value unknown and the vessel and/or carrier are not responsible for quantity, weight, measurement, gauge, specifications, brands, countermarks, numbers, or declaration or description of contents of packages."

It was held in *New Chinese Antimony Co., Ltd. v. Ocean Steamship Co., Ltd.*[1] where the statement of the quantity of the goods in the bill of lading was qualified by the words "weight, measurement, contents and value (except for the purpose of estimating freight) unknown," that the bill of lading was not even *prima facie* evidence against the shipowner of the amount or quantity shipped and that the onus was on the cargo-owner of proving what had in fact been shipped. By comparison the terms of clause 2 of the bill of lading in the present case are much more comprehensive. The onus was therefore on the plaintiffs to prove what was shipped on board the Atlas Maru at Hong Kong but, in view of the discontinuance of their action, no evidence was given on their behalf.

It is however clear from the ship's manifest, which is a document admitted by counsel on both sides, that the packages of goods shipped under bill of lading No. 72 had the following features: first, they bore the marks BH Singapore, secondly, they consisted of 79 packages, thirdly, they were shipped by Sing Yuen Co., and fourthly, under the heading "Consignee" were typed the words "Order/Notify Ban Hoe Co." It was not disputed by counsel for the Third Party that this was the only consignment on board the Atlas Maru which had all these features. It is further to be observed that this was the only consignment on the vessel shipped by Sing Yuen Co. and moreover that it was the only consignment on the vessel which consisted of 79 packages. It must be added that according to the uncontradicted evidence of Mr. Gourly the delivery order was issued by his company in respect of the letter of indemnity and also in respect of bill of lading No. 72. Having regard to all these considerations I am of opinion that the defendants have established a nexus between the delivery of the goods to Ban Hoe Co. and the plaintiffs' action against them. It is clear that the action brought by the plaintiffs against the defendants was a consequence arising from or relating to the delivery to Ban Hoe Co. of the goods described in the letter of indemnity. That being so, it follows that under the terms of the contract of indemnity, which are wide and comprehensive, the Third Party is liable to indemnify the defendants in respect of the solicitor and client costs which the defendants have incurred in defending the action brought against them by the plaintiffs.

I have already stated my reasons for reaching the conclusion that the goods which were delivered to Ban Hoe Co. were in fact those set out in the letter of indemnity. There is no evidence and no reason to suppose that the 79 packages were tampered with in any way during the voyage from Hong Kong to Singapore. Sing Yuen Co. may have had good reason for describing the packages in the way they did in the bill of lading. As merchants engaged in the export trade and as parties to the bill of lading they could hardly have failed to know the meaning of clause 2 thereof. In my opinion the evidence adduced in this case leads to the conclusion that only one consignment of goods was shipped under bill of lading No. 72 and that was the consignment which was delivered to Ban Hoe Co. In other words I am satisfied from the evidence and find as a fact that the goods shipped by Sing Yuen Co. at Hong Kong were the very same goods that were delivered to Ban Hoe Co. in Singapore.

Counsel for the Third Party submitted that the burden is on the defendants to prove that they have strictly complied with the terms of the letter of indemnity and it cannot be doubted that this is a correct proposition of law. On this point, in view of the conclusions which I have reached, it is clear, in my judgment, that the defendants have proved that they have done all that they were required to do under the contract of indemnity. It follows, therefore, that in the events which have happened, the defendants are entitled to enforce their claim against the Third Party.

There is one further observation which remains to be made on this case. In the Court below, counsel for the defendants contended that the description and particulars of the goods set out in the letter of indemnity should be ignored and that the document should be construed as if it merely related to 79 packages without any indication of their contents. This proposition, which, as the learned trial Judge said in his judgment, was quite untenable, was not put forward before this Court. Counsel for the defendants expressly stated in this Court that he did not wish to pursue that line of argument; instead, he contended that the evidence led to the conclusion that the goods described item by item in the letter of indemnity were in fact delivered to Ban Hoe Co. As I have already indicated, this contention is in my opinion well-founded, but in view of the manner in which the case was argued in the Court below, it can well be understood why it was not dealt with by the learned trial Judge in his judgment.

For the reasons which I have stated I am of opinion that the appeal should be allowed with costs.

Appeal allowed.

Solicitors: *Drew & Napier, Donaldson & Burkinshaw.*

TEO THIN CHAN & ANOR. v. PUBLIC PROSECUTOR

[A. Cr. J. (Smith J.) July 2, 1957]

[K. L. — Criminal Appeal No. 19 of 1957]

Trial — Assault — Complainant's evidence — No certified copy of first report — Evidence Ordinance, 1950, s. 114(g).

This appeal arose out of a private summons case for assault. The evidence produced at the trial was that of the complainant herself and her mother who was very much an interested party. No certified copy of the first report which the complainant made to the police very shortly after the alleged assault was produced at the trial.

Held: (1) in this case it was necessary for the complainant to support her evidence with that of the first report;

(2) as the first report was not produced at the close of the prosecution case, the Magistrate should not have called upon the appellants for their defence.

Case referred to:—

(1) *Chin Khing Siong v. R.* (1952) M.L.J. 74.

MAGISTRATE'S CRIMINAL APPEAL.

D. G. Rawson for the appellants.

K. Chelvanayagam for the respondent.

Smith J. : — This was a private summons. At the trial the evidence of the complainant consisted of herself and her mother who was very much an interested party. The alleged assault took place in August 1956, and a report was made about that time to the police. In December, 1956, a complaint was made to the Magistrate and the case was heard before the learned Magistrate on the 29th January, 1957. At the trial the complainant failed to produce a certified copy of the report which she made to the police in August, 1956, very shortly after the alleged assault.

I agree with learned counsel for the appellants that the rule in *Chin Khing Siong v. R.*[1], applies to the facts of this case. In that case the evidence for the prosecution consisted solely of that of the complainant and Spenser-Wilkinson J., held that if the prosecution failed to produce the first report to corroborate the testimony of the complainant (which is possible under section 157 of the Evidence Ordinance) then the presumption arises under section 114(g) of the Evidence Ordinance that that report which could have been and had not been produced would, if produced, have been unfavourable to the complainant.

In this case the complainant is not the only witness; she is supported by the evidence of her mother. The mother, however, was very far from being an independent witness and for this reason I consider that it was necessary for the complainant to support her evidence with that of the first report. This first report not having been produced at the close of the prosecution case, the learned Magistrate should not have called upon the two appellants for their defence. I accordingly reversed the finding and sentence and acquitted the appellants.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; K. Chelvanayagam.*